

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
3:06cr50

UNITED STATES OF AMERICA	)	
	)	
v.	)	<u>ORDER</u>
	)	
ANTONIO NAVARRO HOWIE (1)	)	
_____	)	

**THIS MATTER** comes before the Court on the defendant's Motion For Relief from Judgment pursuant to Rule 60(b) of the Federal Rules Of Civil Procedure. (Doc. No. 106).

The defendant asks the Court to reconsider its decision made at the sentencing hearing not to depart downwardly from the advisory guideline range. (Doc. No. 106: Motion at 11). A defendant may not attack a criminal conviction using the Rules of Civil Procedure. United States v. Leake, 96 Fed. Appx. 873 (4th Cir. 2004) (citing United States v. O'Keefe, 169 F.3d 281, 289 (5th Cir. 1999) and United States v. Mosavi, 138 F.3d 1365, 1366 (11th Cir. 1998)). Additionally, the Fourth Circuit has found that civil Rule 60(b) motions in criminal cases may be dismissed as untimely if not brought within the time to file a notice of appeal. United States v. McKelver, 225 Fed. Appx. 185, 186 (4th Cir. 2007). Here, the motion was filed nearly nine months after the judgment became final when no direct appeal was filed. Therefore, the motion was untimely.

Even if the Court were to consider the merits of the defendant's claim under Rule 60(b), the Court would reject it. The Court was aware of its discretion to depart or vary from the advisory guidelines and chose not to. The information presented in the defendant's motion does not alter that ruling.

**IT IS, THEREFORE, ORDERED** that the defendant's Motion for Relief from Judgment (Doc. No. 106) is **DENIED**.

Signed: April 24, 2009

A handwritten signature in cursive script, reading "Robert J. Conrad, Jr.", written over a horizontal line.

Robert J. Conrad, Jr.  
Chief United States District Judge

